

Annex A: Draft Regulations

Draft Regulations laid before the Scottish Parliament under section 24(2) of the Tied Pubs (Scotland) Act 2021, for approval by resolution of the Scottish Parliament.

SCOTTISH STATUTORY INSTRUMENTS

2022 No.

LANDLORD AND TENANT

The Scottish Pubs Code Regulations 2022

Made - - - - - ***

Coming into force - - - - - ***

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 1 and schedule 1 of the Tied Pubs (Scotland) Act 2021⁽¹⁾ and all other powers enabling them to do so.

PART 1

General

Citation and commencement

1. These Regulations may be cited as the Scottish Pubs Code Regulations 2022 and come into force on ***.

General interpretation

2.—(1) In these Regulations—

“the Act” means the Tied Pubs (Scotland) Act 2021,

“adjudicator” means the Scottish Pubs Code Adjudicator, an office established under section 2 of the Act,

“beer” and “cider” have the meanings given in section 1 of the Alcoholic Liquor Duties Act 1979⁽²⁾,

“code” means the Scottish Pubs Code as set out in these Regulations,

“group undertaking” has the meaning given by section 1161 of the Companies Act 2006⁽³⁾,

“landlord of a pub” includes any person who is a group undertaking in relation to the person who is actually the landlord,

“pub” means premises—

(a) in respect of which a premises licence within the meaning of section 17 of the Licensing (Scotland) Act 2005⁽⁴⁾ has effect, and

⁽¹⁾ 2021 asp 17.

⁽²⁾ 1979 c.4.

⁽³⁾ 2006 c.46.

⁽⁴⁾ 2005 asp 16.

- (b) in which the main activity (or one of the main activities) carried on is the sale of alcohol to members of the public for consumption on the premises,

“pub-owning business” means the landlord under the lease of a tied pub,

“stocking requirement” means a contractual obligation which—

- (a) requires that some of the beer or cider (or both) that is to be sold in the pub is produced by the landlord,
- (b) does not require the tenant to procure that beer or cider from a particular supplier, and
- (c) neither prevents the tenant from, nor penalises the tenant for, selling in the pub beer or cider that is produced by a person other than the landlord (although a contract term may impose restrictions on such sales),

“tied pub” means a pub which is being leased to a tenant who is subject to a contractual obligation which—

- (d) requires that some or all of the alcohol to be sold in the pub be supplied by—
 - (i) the landlord of the pub, or
 - (ii) a person nominated by the landlord, and
- (e) is not a stocking requirement,

“writing” includes electronic communication within the meaning of section 15 of the Electronic Communications Act 2000⁽⁵⁾.

(2) References in these Regulations—

- (a) to a pub-owning business include a person who has been a pub-owning business,
- (b) a tied-pub tenant include a person who has been the tenant under the lease of a tied pub.

The regulatory principles

3. In relation to their duties under this code, pub-owning businesses are required to act in accordance with the regulatory principles set out in section 3(3) of the Act—

- (a) the principle of fair and lawful dealing by pub-owning businesses in relation to their tied-pub tenants,
- (b) the principle that tied-pub tenants should not be worse off than they would be if they were subject to neither a product tie nor a service tie,
- (c) the principle that any agreement between a pub-owning business and a tied-pub tenant should fairly share the risks and rewards amongst the parties.

Tied-pub tenant not to suffer detriment

4. A pub-owning business must not subject a tied-pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under this code.

Disputes

5.—(1) Disputes between a tied-pub tenant and a pub-owning business about whether the business has complied with a term of this code may be submitted to the adjudicator for arbitration under sections 14 to 18 of the Act.

(2) But pub-owning businesses and tenants are to use their best endeavours to resolve such disputes informally.

⁽⁵⁾ 2000 c.7.

PART 2

Market rent only leases

Definitions relevant to market rent only leases

6. In this Part—

“dilapidations requirement” means a lease term under which a landlord may require their tenant to carry out repairs or other works falling within the tenant’s repairing obligations under the lease,

“lease” includes any agreement between the landlord and the tenant of a pub that relates to the tenant’s occupation of the pub or the activities carried on in the pub,

“market rent” means the estimated rent which it would be reasonable to pay in respect of the occupation of the pub under a tenancy, assuming that—

- (a) the hypothetical tenancy is entered into—
 - (i) on the date the estimate of the rent is being carried out,
 - (ii) in an arm's length transaction,
 - (iii) after proper marketing,
 - (iv) between parties who are all acting knowledgeably, prudently and willingly, and
- (b) the pub will continue to be a pub,

“MRO lease” means market rent only lease,

“product tie” means a contractual obligation which—

- (c) requires that a product to be sold in a pub must be supplied by—
 - (i) the landlord of the pub, or
 - (ii) a person nominated by the landlord, and
- (d) is not a stocking requirement (as defined in regulation 2(1)),

“pub franchise agreement” means an agreement between a pub-owning business and a tied-pub tenant for the tenant to occupy the tied pub which—

- (e) grants the tenant a share of turnover,
- (f) requires the pub-owning business to offer marketing, training and other business support to the tenant,
- (g) grants the tenant a right to use an established pub business model and may require the tenant to pay a fee in respect of the use of that model,
- (h) does not require the tenant to pay to the pub-owning business any other amount in respect of the tenant’s occupation of the tied pub,
- (i) does not require the tenant to make any other payments to the pub-owning business in connection with the supply of products or services to the tenant, unless the tenant consents to such an arrangements after entering into the pub franchise agreement, and
- (j) grants the tenant a right to sell the business to a third party at market value,

“service tie” means a contractual obligation which requires that the tenant of a pub receives a service, other than insurance, from—

- (k) the landlord of the pub, or
- (l) a person nominated by the landlord

Characteristics of an MRO lease

7.—(1) An MRO lease—

- (a) sets the rent payable in respect of the tenant's occupation of the pub at—

- (i) an amount agreed between the landlord and the tenant in accordance with the procedure described in this code, or
 - (ii) in the event that no agreement is reached in accordance with that procedure, the market rent,
 - (b) imposes neither a product tie nor a service tie in relation to the pub,
 - (c) complies with any requirements set out in this code as to the terms that a lease must contain in order to be an MRO lease, and
 - (d) does not contain any unreasonable terms.
- (2) An MRO lease modifies a tied-pub tenant's existing lease only to the extent necessary for that lease to become an MRO lease, except where the tenant consents to more extensive modification of their existing lease or to a new lease being offered.
- (3) An MRO lease may, at the discretion of the pub-owning business, be for a period longer than the remaining period of the existing lease.
- (4) The following terms are unreasonable in an MRO lease; accordingly any offer which includes such terms is not an offer of an MRO lease—
- (a) a break clause only exercisable by the pub-owning business (unless such a term is included in the existing lease),
 - (b) a lease period shorter than the remaining period of the existing lease,
 - (c) a stocking requirement other than as defined in regulation 2(1),
 - (d) a deposit requirement more onerous than in the existing lease,
 - (e) a requirement to pay rent in advance more onerous than in the existing lease,
 - (f) a term triggering dilapidations requirements in the existing lease or imposing dilapidations requirements more onerous than in the existing lease,
 - (g) a personal guarantee requirement more onerous than in the existing lease, except with the consent of the tied-pub tenant,
 - (h) a tenant repairing obligation more onerous than in the existing lease, except where the MRO lease offered is for a period of 5 years or more, or with the consent of the tied-pub tenant.

Requirement to offer an MRO lease

- 8.—**(1) A pub-owning business must offer their tied-pub tenant an MRO lease at the tenant's request.
- (2) But a pub-owning business need not offer an MRO lease where—
- (a) the term of the tenant's lease is one year or less,
 - (b) the term of the tenant's lease is more than one year, during the first half of the term,
 - (c) the tenant has requested an MRO lease within the past two years,
 - (d) the tenant occupies the pub under a pub franchise agreement, or
 - (e) the investment exception applies.
- (3) The investment exception applies—
- (a) for 5 years from the date an investment agreement was agreed, where the pub-owning business is investing in capital improvement works to the pub to the sum of £35,000 or more, or 1.5 times the annual rent of the pub or more, whichever is the greater, or
 - (b) for 7 years from the date of an investment agreement was agreed, where the pub-owning business is investing in capital improvement works to the pub to the sum of 10 times the annual rent of the pub or more.
- (4) The investment exception does not apply unless—
- (a) the investment agreement has been entered into voluntarily by the tenant outside of any obligation arising under their lease,
 - (b) the tenant has, before entering into the investment agreement, been given the opportunity to obtain alternative estimates for the works, and

- (c) the pub-owning business has, before entering into the investment agreement, informed their tenant about how the investment agreement may affect the tenant’s right to an MRO lease.
- (5) The investment exception ceases to apply where capital improvement works arranged under an investment agreement have, without reasonable excuse—
 - (a) not started within 12 months of the date agreed in the investment agreement, or
 - (b) stopped for 12 months or more.
- (6) For the purposes of paragraph (5), “reasonable excuse” includes where the works do not start, or stop, due to circumstances beyond the control of the pub-owning business or the tenant.
- (7) In this regulation—
 - “investment agreement” means a written agreement between the pub-owning business and their tenant for the pub-owning business to invest in capital improvement works to the pub,
 - “capital improvement works” does not include routine maintenance, works carried out under landlord repairing obligations, works carried out under dilapidations requirements, or works to make a pub safe and compliant with health and safety requirements before letting it to the tenant.

Process for offering an MRO lease

- 9.**—(1) The tied-pub tenant may request an MRO lease from the pub-owning business and any such request must be in writing.
- (2) The pub-owning business must send the tenant an offer of an MRO lease in writing as soon as possible and in any event within 4 weeks beginning with the day the tenant’s request was received by the business⁽⁶⁾.
 - (3) An offer of an MRO lease must set out—
 - (a) any variation to the terms of the existing lease, including to the rent due, and
 - (b) the legal steps required to change the existing lease to an MRO lease.
 - (4) Following the offer of an MRO lease there is to be a negotiation period during which the pub-owning business and the tenant are to use their best endeavours to agree terms and enter into an MRO lease as soon as possible.
 - (5) The negotiation period is to last no longer than 8 weeks beginning with the day the tenant’s request was received by the pub-owning business.
 - (6) The negotiation period may be extended by up to 4 weeks by mutual agreement between the pub-owning business and the tenant.
 - (7) The pub-owning business and the tenant are to meet their own legal costs in connection with entering into an MRO lease.

Assessing the market rent of an MRO lease

- 10.**—(1) If at the end of the negotiation period the pub-owning business and the tied-pub tenant have not reached agreement on the rent to be paid under the MRO lease, a rent assessor is to be appointed to determine the market rent which will apply to the MRO lease.
- (2) The rent assessor is to be appointed within 3 weeks beginning with the day the negotiation period ends.
 - (3) The rent assessor is to be appointed—
 - (a) jointly by the pub-owning business and the tied-pub tenant, or
 - (b) if a joint appointment cannot be agreed, by the adjudicator.
 - (4) The rent assessor’s terms of appointment must require the rent assessor to determine the market rent for the MRO lease, and notify the pub-owning business and tied-pub tenant of that determination, within 4 weeks beginning with the date of the rent assessor’s appointment.

⁽⁶⁾ See section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (2010 asp 10) for assumptions about the date of receipt of documents served as required in legislation.

(5) If the offer of an MRO lease has not been accepted by the tied-pub tenant within 2 weeks beginning with the day the tenant received the market rent determination the rent assessment period comes to an end.

(6) The rent assessor's fees are to be split equally between the pub-owning business and the tenant.

(7) The rent assessor must be a member or fellow of the Royal Institution of Chartered Surveyors⁽⁷⁾.

(8) The adjudicator may set additional criteria that a person must meet in order to be appointed as a rent assessor.

Referring a failure to agree an MRO lease to the adjudicator

11. If at the end of the negotiation period and any rent assessment period the pub-owning business and the tied-pub tenant have not agreed the terms the MRO lease, this failure to agree may be referred to the adjudicator as a dispute under regulation 5.

PART 3

Guest beer agreements

Definitions relevant to guest beer agreements

12. In this Part—

“request date” means the date on which a tied-pub tenant requests in writing a guest beer agreement from the pub-owning business.

Characteristics of a guest beer agreement

13.—(1) A guest beer agreement is an agreement that—

(a) allows a tied-pub tenant to—

(i) sell to the pub's customers, at a price of the tenant's choosing, at least one beer chosen by the tenant (regardless of who produces it), and

(ii) change the chosen beer as frequently as the tenant wishes,

(b) allows the tenant to do those things without penalty, and

(c) satisfies the criteria specified in paragraph (2).

(2) A guest beer agreement must—

(a) not relate to a brand of a beer of which either—

(i) more than 60,000 hectolitres was produced in the calendar year immediately preceding the calendar year in which the request date occurs, or

(ii) the producer reasonably estimates that more than 60,000 hectolitres will be produced in the calendar year in which the request date occurs,

(b) not vary the existing lease except—

(i) to the extent necessary to include the guest beer agreement, and

(ii) where a service equipment charge has been agreed by the parties, to provide for that charge,

(c) not penalise the tied-pub tenant in any way, including by requiring the tenant to cease selling any product,

(d) not restrict the tied-pub tenant from purchasing a guest beer from a person of the tenant's choosing,

(e) not contain any restrictions on how a guest beer may be purchased, stored or sold (for example, in casks, kegs, bottles).

⁽⁷⁾ Commonly referred to as the RICS, a UK-based professional body for surveyors founded on 15 June 1868 and incorporated by Royal Charter on 26 August 1881.

(3) In this regulation, “service equipment charge” means a reasonable charge by the pub-owning business for the cost of servicing or maintaining equipment used to sell guest beer, taking into account the proportion of use of the equipment for guest beer compared to use for other products.

Requirement to offer a guest beer agreement

14.—(1) A pub-owning business must offer to enter into a guest beer agreement with the tied-pub tenant at the tenant’s written request.

(2) But a pub-owning business need not offer to enter into a guest beer agreement where, on the request date—

- (a) the remaining term of the tied-pub tenant’s lease is less than 6 months,
- (b) the tied-pub tenant and the pub-owing business have agreed a guest beer agreement which—
 - (i) meets the criteria specified in regulation [13], and
 - (ii) was agreed on or after the date on which these Regulations come into force,
- (c) the tenant has been offered, following his or her request, a guest beer agreement within the previous two years, or
- (d) unless the parties agree otherwise, the MRO negotiation exception applies.

(3) The MRO negotiation exception applies where either—

- (a) the request date falls during the period in which an MRO lease for the pub is being negotiated between the parties, including any period of extension agreed between the parties, in terms of regulation [9], or
- (b) a rent assessor is determining the rent to be paid for the pub under an MRO lease, in terms of regulation [10].

Process for offering a guest beer agreement

15.—(1) The tied-pub tenant may request a guest beer agreement from the pub-owning business and any such request must be in writing.

(2) The pub-owning business must send the tenant an offer to enter into a guest beer agreement in writing as soon as possible and in any event within 4 weeks beginning with the day on which the tenant’s request was received by the business⁽⁸⁾.

(3) The pub-owning business and the tenant are to meet their own legal costs in connection with entering into a guest beer agreement.

(4) The tied-pub tenant and the pub-owning business must take reasonable steps to minimise—

- (a) the costs, and
- (b) the administrative burden

of entering into a guest beer agreement.

⁽⁸⁾ See section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (2010 asp 10) for assumptions about the date of receipt of documents served as required in legislation.